IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

BIG SALMON VENTURES, LLC, Appellant, v. HAINES BOROUGH, Appellee.	)	Case No.1JU-15-992 CI

DECISION ON APPEAL

I. FACTS AND PROCEDURAL HISTORY

Big Salmon Ventures, LLC, owns property at Mile 26, Chilkat Road in Haines on which it wishes to operate a winter sports lodge. Big Salmon applied for a conditional use permit to operate a commercial heliport to run heliski tours from the property.

Under the property's "General Use" (GU) zoning, the applicant must establish that its proposal meets each of eight criteria set forth in the Borough code. At a hearing on November 12, 2015, the Haines Borough Planning Commission denied the permit application. On November 17, an Administrative Assistant in the Borough's Lands Department signed a letter to Big Salmon formally notifying it of the Commission's decision, and setting out specific reasons why the Commission concluded that the application did not meet six of the eight criteria. Sometime after that, the Chair of the Planning Commission transmitted to the Borough Assembly by e-mail a document setting out in greater detail what purported to be the Planning Commission's "Record of Decision."

Big Salmon filed a timely request for rehearing before the Haines Borough Assembly, which voted on December 1, 2015 not to rehear the matter. This appeal follows.

II. STANDARD OF REVIEW

In reviewing the denial of a conditional use permit by a municipal zoning board, the court applies the substantial evidence test. Under this test, the zoning body's decision "shall not be reversed if, in light of the whole record, [it] is supported by substantial evidence."[1] Substantial evidence is "evidence that a reasonable mind might accept as adequate to support a conclusion."[2] In applying this test, judicial review of the zoning body's decision is narrow and a presumption of validity is accorded to the decision below.[3]

The sufficiency of the factual findings below is a legal question which the court decides by exercising its independent judgment.[4] The test of the sufficiency of an agency's findings of fact is "a functional one: do the [agency's] findings facilitate this court's review, assist the parties and restrain the agency within proper bounds?"[5] The question is "whether the record sufficiently reflects the basis for the board's decision so as to enable meaningful judicial review."[6]

In reviewing questions of law which involve agency expertise, the court applies the reasonable basis test. As to questions of law which do not involve agency expertise, the court applies the substitution of judgment test.[7]

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[1] *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 173 (Alaska 1993).
[2] *Griswold v. City of Homer*, 55 P.3d 64, 67 (Alaska 2002).
[3] *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d at 173.
[4] *Horan Peninsula Borough Board of Equalization*, 247 P.3d 990, 997 (Alaska 2011).
[5] *Id., quoting Faulk v. Bd. of Equalization*, 934 P.2d 750, 751 (Alaska 1997); *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d at 175.
[6] *Fields v Kodiak City Council*, 628 P.2d 927, 932 (Alaska 1981).
[7] *Griswold v. City of Homer*, 252 P.3d at 1020.

III. DISCUSSION

A. Introduction:

Big Salmon's arguments on appeal can be broadly divided into three categories. The first category includes several procedural challenges to the Planning Commission action. The second category includes a claim that the conditional use permit ordinance is void for vagueness, and a substantive challenge to the Planning Commission decision on its merits. And the third category involves a challenge to the decision of the Borough Assembly not to rehear the matter.

B. Procedural Challenges to the Planning Commission Action:

1. *Did the Planning Commission Properly Record its Vote?*

When it came time for the Planning Commission to vote, the Chairman did not call for a roll call, but instead called for a show of hands. He noted that two members of the Commission ("Donnie and Brenda") voted to approve the permit. He then asked for those opposed to raise their hands, but did not specifically note which Commissioners were opposed. The Commissioner then said "So opposed has it," and noted that the permit was denied.

There can be no serious dispute that "Donnie" is Commissioner Donnie Turner, and "Brenda" is Commissioner Brenda Josephson. No other members of the Commission share those first names, and the failure to note their last names can hardly be dispositive.

Big Salmon does not contend that those two votes could have been sufficient to grant the permit. Thus the failure to record the vote more specifically does not require reversal.[8]

2. *May the Court Consider the Commission's Written Findings?*

Big Salmon argues that the court may not consider the November 17, 2015 letter signed by an Administrative Assistant in the Borough's Lands Department as a statement of the findings of the Commission. Big Salmon notes that there is no evidence that the Commission approved the letter, or that each of the Commissioners who voted against the grant of the permit endorsed each of the findings in the letter.

There is no requirement in Alaska law that a zoning agency adopt formal written findings. On the contrary, in reviewing the findings of a planning agency, the court may look to the record as a whole to clarify the agency's reasoning and conclusion.[9] In some cases, even in the absence of any formal findings, the basis for the decision will be clear from a review of the record.[10] Thus the Alaska Supreme Court has never held that any particular level of formality is necessary in agency findings.

Here, a staff person employed by the Borough's Lands Department issued a letter setting out the Commission's findings. The record is silent about who actually wrote this letter, or which members of the Commission specifically read and approved it before it was issued.

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[8] There is no question, however, that a public body ought to make a more formal record of its actions than simply noting the first names of the two commissioners who voted in the affirmative. The Planning Commission is cautioned to record its votes more formally in the future.

[9] *See, e.g., Horan v. Kenai Peninsula Bd. of Equalization,* 247 P.3d at 997.

[10] *See, e.g., Mobil Oil Corp. v. Local Boundary Comm'n.*, 518 P.2d 92, 97 (Alaska 1974); *K & L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 360 (Alaska 1971); *South Anchorage Concerned Coalition, Inc. v. Coffey,* 862 P.2d at 175.

Big Salmon, though, speculates that the members of the Commission may not have been aware of this letter before it was sent.

Absent any authority requiring a particular level of formality in agency findings, or any evidence that the Commission did not approve the letter, I see no reason to disregard it. As noted above, a presumption of validity is accorded to an agency's decision.[11] Absent any authority for such requirements, I am not willing to require that the Commission reconvene to formally adopt the findings set out in its staff person's letter, or that each Commission member individually sign the letter.[12] I thus will consider that letter – in the context of the entire record – as a statement of the Commission's findings.[13]

I reach a different conclusion as to Commission Chair Goldberg's subsequent written statement entitled "Record of Decision." The Borough concedes that this document was not adopted by the Commission, and I will not consider it as part of the Commission's findings.

3. *Did the Commission Make Sufficient Findings to Permit Judicial Review?*

Big Salmon's final procedural argument is that the Commission did not set out sufficient findings to permit judicial review. As noted above, the test of the sufficiency of an agency's findings of fact is "a functional one: do the [agency's] findings facilitate this court's review, assist the parties and restrain the agency within proper bounds?"[14] The question is

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[11] *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d at 173.
[12] One could compare the letter to the orders the Clerk of the Supreme Court regularly issues, setting out an order issued "at the direction of the court."
[13] The Borough would be well advised, however, to make it clearer in the future that a letter of this type is written on behalf of the Planning Commission, or to document that the Commission has approved the letter as a statement of its findings.
[14] *Id., quoting Faulk v. Bd. of Equalization*, 934 P.2d 750, 751 (Alaska 1997); *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d at 175.

"whether the record sufficiently reflects the basis for the board's decision so as to enable meaningful judicial review."[15]

Big Salmon compares this case to *Alaska Mountain Guides Adventures, Inc. v. Municipality of Skagway*,[16] in which this court held that the Skagway Planning Commission failed to make sufficient findings to permit judicial review.

In *AMG,* though, the Commission's findings were entirely conclusory. The Commission merely recited the requirements of the Code, and stated without explanation that those requirements were not met.

Here, by contrast, the Commission's letter referenced the specific evidence upon which its conclusions were based, and described the Commission's reasoning. While the description was brief, it is sufficient to permit review of the Commission's action. I thus reach a different conclusion than I did in *AMG.* In my view, the findings set out in the Commission's letter are sufficient to permit judicial review.

C. Was there Substantial Evidence to Support the Commission's Decision?

1. *The Ordinance*:

The Haines Borough Code, §18.50.040, sets out eight criteria which must be met before a conditional use permit may be issued:

> 1. The use is so located on the site as to avoid undue noise and other nuisances and dangers;
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> 2. The development of the use is such that the value of the adjoining property will not be significantly impaired;

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[15] *Fields v Kodiak City Council*, 628 P.2d 927, 932 (Alaska 1981).
[16] Case Number 1JU-15-498 CI (decision issued November 3, 2015).

3. The size and scale of the use is such that existing public services and facilities are adequate to serve the proposed use;

4. The specific development scheme of the use is consistent and in harmony with the comprehensive plan and surrounding land uses;

5. The granting of the conditional use will not be harmful to the public safety, health or welfare;

6. The use will not significantly cause erosion, ground or surface water contamination or significant adverse alteration of fish habitat on any parcel adjacent to state-identified anadromous streams;

7. The use will comply with all required conditions and specifications if located where proposed and developed, and operated according to the plan as submitted and approved;

8. Comments received from property owners impacted by the proposed development have been considered and given their due weight.

The Commission found that Big Salmon's application failed to satisfy criteria 1, 2, 4, 5, 6 and 8 (noise, property values, consistency with other uses, public safety, water contamination, and comments from property owners, respectively).

The Borough correctly argues that it is not necessary to review each of these findings. The decision of the Commission must be affirmed if there is substantial evidence to support any one of these findings.

2. *Vagueness*:

Before discussing whether there is substantial evidence to support the Commission's decision, it is necessary to deal with Big Salmon's argument that the requirements of the ordinance would be void for vagueness if they were used to deny Big Salmon's application. Big Salmon argues that the Haines Borough ordinance is unconstitutionally vague because its

criteria are entirely subjective. Big Salmon relies for this argument on *Lazy Mountain Land Club v. Matanuska-Susitna Borough Board of Adjustment & Appeals*.[17]

In *Lazy Mountain Land Club,* the Supreme Court held that a Mat-Su conditional use permit ordinance was not void for vagueness. The challenged ordinance required a conditional use permit for junkyards and refuse areas which were "potentially damaging to the property values and usefulness of adjacent properties and/or potentially harmful to the public health, safety and welfare."[18] A property owner who wished to open a disposal site for used building materials challenged this ordinance, arguing that the definition of a "junkyard and refuse area" in the ordinance was unduly broad.

In ruling on this challenge, the Supreme Court noted that it will consider whether there has been a "history of arbitrary enforcement or if the language of the statute is so conflicting and confused that arbitrary enforcement is inevitable."[19] Because the court found no evidence of arbitrary enforcement, and because it was sufficiently clear that the ordinance applied to the applicant's proposal to put the applicant on notice, the Court found that the ordinance was not unconstitutionally vague.

In support of its argument that there has been arbitrary enforcement, Big Salmon points to the Borough's treatment of a previous permit application by Big Salmon.[20] In the previous case, the Planning Commission denied Big Salmon's application, but the Assembly reversed

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[17] 904 P.2d 373 (Alaska 1995).
[18] *Id.* at 376.
[19] *Id.* at 385.
[20] The prior application was the subject of a prior appeal to the Superior Court, case number 1JU-14-654 CI. That case was heard by Superior Court Judge Louis Menendez. Big Salmon seems to mistakenly assume that the undersigned heard that case, and therefore that the undersigned is familiar with its history.

this decision and granted a temporary permit. A third party appealed that decision to the Superior Court, which dismissed the appeal as moot after the temporary permit expired. Big Salmon does not clearly explain what about the previous application establishes a history of arbitrary enforcement. Nor does Big Salmon point to any other evidence of a history of arbitrary enforcement.

The Supreme Court's decision in *Lazy Mountain Land Club* dealt with a different issue than the one here. In *Lazy Mountain,* the issue was whether the definition in the ordinance was so broad as to be void for vagueness. As to the substantive ordinance, though, the ordinance challenged in *Lazy Mountain* was no less "subjective" than the ordinance challenged here. There is nothing in *Lazy Mountain* which supports the claim that a zoning ordinance is void for vagueness if it calls for the agency to consider "subjective" factors in deciding whether to issue a permit.

The ordinance at issue in *Lazy Mountain* called upon the commission to determine whether the proposed use was "potentially damaging to the property values and usefulness of adjacent properties and/or potentially harmful to the public health, safety and welfare," which are essentially identical to subsections 2 and 5 of the Haines ordinance.[21] The Supreme Court noted that the "underlying purpose" of this ordinance is to "allow the Planning Commission to make a case by case determination about the appropriateness of placing a noxious use in a

[21] Indeed, the provisions at issue in *Lazy Mountain* are arguably broader than the Haines ordinance, because they seem to authorize denial of a permit on the basis of "potential" harm to property values or to the public health, safety and welfare.

particular area...."[22] This "case by case determination" of the appropriateness of a proposed development is essentially the "subjective" analysis objected to by Big Salmon.

Given that, I cannot conclude that the Supreme Court's decision in *Lazy Mountain Land Club* supports the argument that this ordinance is void for vagueness. There is no authority for the proposition that a municipality may not base a permitting decision on subjective factors. I thus do not find that this ordinance is void for vagueness.

Having dealt with the constitutional claim, I will turn to the substantive issues. The issue to which the most attention was devoted in the Planning Commission hearing was noise. I will, therefore, turn to the issue of noise to determine whether there was substantial evidence to support the Commission's findings.

3. *Noise*

In response to Big Salmon's permit application, the Haines Borough commissioned a Noise Measurement Survey performed by a noise consulting firm, which measured both existing noise levels and noise levels during helicopter operations. Measurements were taken at four locations at and near the heliport site, one of which was a nearby home.

The noise consultant measured several different parameters, including "LMax," the maximum sound level during helicopter operations, and "DNL," the average noise level measured at one minute intervals over a 24 hour period. DNL, of course, would be considerably lower, because under Big Salmon's proposal there would be 20 helicopter takeoffs and landings per day each of which would last only 6-12 minutes.

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[22] *Id.* at 385.

Much of the parties' dispute concerns which of the parameters measured by the noise consultant should have been given the most attention. Big Salmon argues that it was not clear that the Commission made any findings about whether it was appropriate to focus on DNL, the average noise level, or LMax, the maximum level.

The Commission's findings – as described in the November 15 letter – refer to a number of specific sound readings, however, which are LMax levels. The letter refers to a reading of 94 dBA at a home by the helipad, 90 dBA at a neighboring estate, and 77 dBA on Chilkat Road. These are LMax levels.[23] Thus the Commission's own findings represent the adoption of LMax levels as the appropriate measure.

If a very loud freight train ran past a person's otherwise quiet home 20 times a day, taking 6 to 12 minutes to pass each time, the average noise level might remain quite low, but the noise of each passing train might be unbearable. Given this, I certainly cannot find that it was unreasonable for the Commission to use LMax levels, and not DNL levels, to determine whether the project would create undue noise.

Along with the noise consultant's opinion that helicopter noise was "very loud" at a nearby residence, the Commission heard testimony, and received comments, from members of the public who objected to helicopter noise in their neighborhood, which they described as "very quiet."

The noise consultant's measurement of sound levels at a nearby home at 94 dBA, a level described by the survey as "very loud," during helicopter operations certainly supports the Commission's decision. Without question, though, the determination of whether such noise

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[23] ER 22.

levels reach the standard of "undue noise" is a subjective determination. This is no more subjective than the determination of whether the truck traffic generated by a gravel pit is incompatible with a nearby residential use,[24] or whether a dog kennel would produce "appropriate" drainage.[25] In each of these cases, the local agency's subjective determination was upheld on appeal. Thus there is no basis for concluding that the exercise of subjective judgment in permitting decisions is impermissible under the law.[26] Many land use determinations are not susceptible to mathematical formulae.

The determination of whether this proposal meets the subjective standards set forth in the Borough code involves the determination of what sort of community Haines wants to be. These "subjective" determinations about community standards are intended to be made by the Assembly elected by the people of Haines, and the Planning Commission appointed by that Assembly, not by the court. The role of the court is to ensure that those local bodies follow the standards set forth in the Borough code, that their decision is supported by substantial evidence, and that their decision complies with the law. It is not the role of the court to substitute its judgment for that of the local body.

I find that the noise study, together with the testimony of residents about the disruption caused by helicopter noise and their objections to the proposal, constitutes substantial evidence in support of the decision of the Planning Commission that the project would cause "undue noise."

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[24] *South Anchorage Concerned Coalition v. Coffey,* 862 P.2d 128 (Alaska 1993).
[25] *Luper v. City of Wasilla*, 215 P.3d 342 (Alaska 2009).
[26] *See, e.g., South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage,* 172 P.3d 774, 781-2 (Alaska 2007).

Because I find that there was substantial evidence supporting the Commission's finding about "undue noise," it is not necessary to address the other five findings on which the Commission's denial of the permit was based.

D. Rehearing Before the Assembly:

Under Alaska law, the Borough is required to provide for an appeal to the superior court from the decision of a municipal board.[27] The Haines Borough Code provides for such an appeal, and this case is that appeal. Alaska law also permits, but does not require, the Borough to provide for intermediate review by the Borough Assembly.[28]

The Haines Borough Code provides that the Assembly "may choose to rehear the commission's decision.[29] Under that provision, any aggrieved party may appear before the Assembly and explain to the Assembly why it should rehear the commission's decision.

Big Salmon filed a written request on November 17, 2015 for the Assembly to rehear the decision of the Planning Commission. At its meeting December 1, 2015, after hearing a presentation from a representative of Big Salmon, the Assembly voted 4-2 not to rehear the matter. While there was considerable discussion among the members of the Assembly, the Assembly as a body made no written findings or statements of its reasons for declining a rehearing.

Big Salmon argues that this decision was arbitrary and capricious, because the Assembly made no findings setting out its reasons for denying rehearing. The Borough, on the other hand, argues that the Assembly has complete discretion to decide whether to grant

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[27] AS 29.40.050.
[28] *Id.*
[29] §18.30.060.

rehearing, and therefore the Assembly is not required to give any reasons for denying rehearing.

Big Salmon points to no provision of law which required the Assembly to afford an opportunity for any rehearing before the Assembly. Nor does Big Salmon point to any authority for the proposition that the Assembly was required to make formal findings in support of its decision not to exercise its discretion to rehear the matter. In light of my conclusion that the decision of the Planning Commission was supported by substantial evidence, however, I cannot conclude that the Assembly abused its discretion in declining to hear the matter.

This conclusion does not violate due process, since Big Salmon was afforded a hearing before the Planning Commission and an appeal to this court. Big Salmon cites no authority which would entitle a permit applicant, as a matter of due process, to a rehearing in the Assembly as well.[30]

IV. CONCLUSION

The Haines Borough Planning Commission denied Big Salmon's application for a conditional use permit to operate a heliport, and the Commission set out its reasoning in a November 15, 2015 letter signed by a staff member. That decision was supported by substantial evidence in the record. The ordinance upon which this decision was based is not void for vagueness. The Haines Borough Assembly acted within its authority in denying

[30] In light of the uncertainty about when the Assembly should grant rehearing, the Borough should consider whether language should be added to the Borough Code clarifying when a rehearing will be granted.

rehearing of this decision without explanation. For each of those reasons, the decision of the Haines Borough Planning Commission denying the permit is AFFIRMED.

Dated at Juneau, Alaska this 6th day of December, 2016.

Philip M. Pallenberg
Superior Court Judge

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA FIRST JUDICIAL DISTRICT

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